No. 16-1466

In the Supreme Court of the United States

MARK JANUS,
PETITIONER,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which holds that a State may permit a public-employee union to collect a fee from the employees it represents to pay a proportionate share of the costs of its representational activities—collective bargaining, contract administration, and grievance resolution—should be overruled.

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INTRODUCTION

Illinois, like every other State, is not only a sovereign but also an employer. As an employer, Illinois must attract and retain qualified employees; set salaries, benefits, and workplace rules; and impose day-to-day discipline for workplace infractions. Like more than 20 other States, Illinois has decided to allow employees who form a bargaining unit to designate an exclusive representative to negotiate with their public employers over these terms and conditions of employment and to help administer the collective bargaining agreement during the life of the contract. Under this system, the exclusive representative has a duty to fairly represent all of the employees in the bargaining unit, whether or not they are union members.

States have adopted this system because it brings them important benefits as employers. But the process of collective bargaining and contract administration carries a price tag. For example, the representative must pay staff who identify employee priorities and concerns, negotiators who translate those interests into concrete positions at the bargaining table, and field representatives who counsel employees when workplace disputes arise. Historically, many of these costs have been defrayed through union dues, but such dues may also be used by the union to pay for core political and ideological speech such as campaign advertisements with which non-member employees may strongly disagree.

So, for more than 40 years, this Court has struck a balance: public employees may opt out of paying union dues, but can be required to pay an agency fee,

or "fair-share fee," so long as the proceeds are used to support "collective bargaining, contract administration, and grievance adjustment," not political or ideological causes. *Abood v. Detroit Board of Education*, 431 U.S. 209, 225–26 (1977).

Petitioner invites the Court to overrule *Abood* and declare *all* mandatory public-sector agency fees unconstitutional, regardless of the activities they support. The Court should decline that invitation. The core activities funded by agency fees—negotiating employment contracts and resolving workplace grievances—involve speech by an employee representative to an employer in an employment-related forum for employment-related purposes. Accordingly, such fees fall within the wide zone of discretion States enjoy when acting as employers to manage their workforces.

By contrast, agency fees that fund union speech that is directed to the government as a sovereign or to the public in a public forum are not entitled to judicial deference. Such speech—including lobbying and public information campaigns—is citizen speech, not employee speech, even if its message may be broadly related to the welfare of employees. To the extent the plurality opinion in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), treats such activities as "chargeable," that conclusion should be revisited in an appropriate case.

This, however, is not that case. Petitioner's radically overbroad constitutional claim seeks to invalidate *all* public-sector agency fees on the theory that *everything* a public employee union does—right down to the most picayune workplace grievance—is political speech in a public forum. That is not an accurate

view of the world. It would be especially imprudent for the Court to adopt such a view, which rests on mistaken factual assumptions, in a case with no factual record. This Court should not sweep aside a precedent that has helped shape countless employment contracts for four decades. Doing so would unsettle several areas of First Amendment law and would undermine the States' well-established authority as employers to manage their workplaces. *Abood* should be reaffirmed.

STATEMENT

1. In *Abood*, this Court upheld the power of a State to authorize an exclusive representative to collect a mandatory fee from the public employees it is charged with representing. Specifically, the Court drew a line between a union's representational activities—collective bargaining, contract administration, and grievance resolution—and its political or ideological speech unrelated to those activities, holding that the First Amendment permits fees to be used to support the former but not the latter. 431 U.S. at 223–37.

Abood drew upon earlier decisions upholding private-sector agency fee provisions under the Railway Labor Act, *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). *See Abood*, 431 U.S. at 218–19, 226. The Court's primary reason for citing *Hanson* and *Street* was to emphasize its consistent view that any impingement on First Amendment interests effected by agency fees is "constitutionally justified by the legislative assessment of the important contribution of the union shop

to the system of labor relations established by Congress." *Abood*, 431 U.S. at 222.

The Court left the task of refining the boundary between "chargeable" and "non-chargeable" expenses to later cases. *Id.* at 236–37. In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), the Court established a three-part test under which a chargeable expense must "(1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." And in *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 302–10 (1986), the Court specified a procedure by which public-sector unions must notify employees of the activities on which fees are being spent so that employees have a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker.

2. Illinois, like many other States, has chosen to manage labor relations between public employers and employees through a comprehensive system of exclusive representation and collective bargaining. Under that system, a bargaining unit of employees has the option to select a union to act as its exclusive representative in bargaining with the employer, processing grievances, and otherwise administering the collective bargaining contract that governs the employment relationship. No public employee is required to join a union. An exclusive bargaining representative takes on the state-law duty to fairly represent the interests of all employees in the unit, including those who choose not to join the union, and may (but is not

required to) collect an agency fee from non-union employees to pay their proportionate share of the costs of bargaining, contract administration, and related activities.

In enacting the Illinois Public Labor Relations Act (IPLRA), 5 ILCS 315/1 *et seq.*, the legislature declared that "[i]t is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours, and other conditions of employment or other mutual aid or protection." 5 ILCS 315/2. The purpose of the IPLRA is "to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements." *Ibid.*

Public employees are not required to form bargaining units or select representatives. The IPLRA provides that public employees "have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment . . . , and to engage in other concerted activities . . . free from interference, restraint or coercion." 5 ILCS 315/6(a). The Act also provides that public employees "have, and are protected in the exercise of, the right to refrain from participating in any such concerted activities." *Ibid.* To that end, the Act guarantees public employees the right to "present[ ] a grievance to the employer and hav[e] the grievance heard and settled without the

intervention of an employee organization." 5 ILCS 315/6(b). The Act also makes it an unfair labor practice for a union to restrain or coerce an employee in the exercise of rights guaranteed by the Act or to discriminate against an employee because he or she did not join the union or petitioned to have the union decertified. 5 ILCS 315/10(b).

The organization chosen by a majority of the public employees in an appropriate unit is designated as the unit's exclusive representative for purposes of collective bargaining. 5 ILCS 315/6(c). The representative must fairly represent the interests of all employees in the unit, including those who are not dues-paying members of the organization. 5 ILCS 315/6(d). The IPLRA imposes a duty on the employer and the exclusive representative to "meet at reasonable times" and to "negotiate in good faith with respect to wages, hours, and other conditions of employment." 5 ILCS 315/7. Those collective bargaining sessions are exempt from Illinois's Open Meetings Act, as are grievance proceedings. 5 ILCS 120/2(c)(2); 5 ILCS 315/24. The statute excludes from the scope of bargaining "matters of inherent managerial policy," including "the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees." 5 ILCS 315/4. Pension rates are set by the State's Pension Code. *See* 40 ILCS 5/14-108, 5/14-110.

The IPLRA permits (but does not require) collective bargaining agreements to include a provision authorizing the union to collect a fee from employees who are not members of the union. 5 ILCS 315/6(e). That fee is limited to the non-members' "proportion-

ate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." *Ibid.*; *see* 5 ILCS 315/3(g) (defining "fair share agreement"). The Act requires that "[a]greements containing a fair share agreement must safeguard the right of nonassociation of employees based upon bona fide" religious objections. 5 ILCS 315/6(g). An employee with a religious objection to paying the agency fee may instead donate the fee to a nonreligious charity. *Ibid.*

The IPLRA requires that a collective bargaining agreement contain a grievance resolution procedure, which "shall apply to all employees in the bargaining unit" and "shall provide for final and binding arbitration of disputes." 5 ILCS 315/8. The union's duty of fair representation requires it to treat union members and non-members the same for purposes of grievance adjustment. *See* 5 ILCS 315/10(b)(1). An agreement containing a grievance procedure must also contain a provision prohibiting strikes for the duration of the contract. 5 ILCS 315/8.

3. Petitioner Mark Janus is a state employee in a bargaining unit represented by respondent American Federation of State, County and Municipal Employees, Council 31 ("AFSCME") who has chosen not to join the union. Pet. App. 10a. According to his complaint, petitioner "objects to many of the public policy positions that AFSCME advocates, including the positions that AFSCME advocates for in collective bargaining." Pet. App. 18a ¶ 42. Petitioner "does not agree with what he views as the union's one-sided politicking for only its point of view" and believes that the union's bargaining conduct "does not appreciate

the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." *Id.* ¶ 43. Petitioner's complaint does not identify any specific positions taken by AFSCME with which he disagrees or any expenditure to which he objects.

Many of the terms and conditions of petitioner's employment are set out in a collective bargaining agreement entered into by AFSCME and the Illinois Department of Central Management Services. *Id.* at 10a–11a. In addition to setting wages and salaries (JA 320–28), the collective bargaining agreement ("CBA") establishes terms and conditions on such issues as vacations (JA 152–59), holidays (JA 159–63), overtime (JA 163–94), health insurance (JA 194–95), indemnification (JA 198–99), temporary assignment (JA 200–04), promotions (JA 204–13), demotions (JA 213–15), records and forms (JA 215–16), seniority (JA 216–20), and vacancies (JA 220–51). The CBA incorporates by reference the pension rates set by operation of the State's Pension Code. JA 195–97.

The CBA also provides procedures for resolving grievances (JA 124–38) and imposing discipline (JA 146–52), and sets a schedule of meetings between labor and management to discuss and solve problems of mutual concern (JA 143–45). In addition, the CBA sets up programs for training (JA 308–11) and workplace health and safety (JA 295–301). It also prohibits both strikes and lockouts. JA 328.

AFSCME sends an annual notice to petitioner and others in his bargaining unit who pay an agency fee, explaining how the fee was calculated and the procedure for challenging it. Pet. App. 28a–42a. In 2011, the fee was equivalent to 78.06% of union dues. *Id.* at

34a. The notice listed the expenses that were charged to all unit members and formed the basis for that calculation, which was audited by a certified public accountant, and included tables illustrating how the fee amount was determined. *Id.* at 34a–39a. The notice also informed employees that they could file a written challenge to the fee amount and that, if they did, the burden would shift to AFSCME to justify the fee to a neutral arbitrator. *Id.* at 40a–41a.

4. Illinois Governor Bruce Rauner initiated this case by filing suit against various Illinois public employee unions and asking for declarations that the agency fee provision in the IPLRA violated the First Amendment. He also sought a declaration authorizing his issuance of an executive order barring the collection of such fees. Dist. Ct. Doc. 1. The district court allowed Illinois Attorney General Lisa Madigan to intervene as a defendant on behalf of the People of the State of Illinois. Dist. Ct. Doc. 53.

Defendants filed a motion to dismiss (JA 20–59), and petitioner, along with two other state employees, then moved to intervene as plaintiffs (JA 60–62). The court dismissed Governor Rauner's complaint, holding that it lacked subject matter jurisdiction over his claims and that he lacked Article III standing to challenge the constitutionality of the IPLRA. JA 104, 106–10, 113. As to intervention, the court recognized that it generally could not allow a party to intervene in an action over which it lacks jurisdiction, but went on to grant intervention here under what it viewed as an exception to that rule that applies when a court has an independent basis to exercise jurisdiction over a separate claim brought by an intervening party. JA 110–13.

Petitioner and one of the other intervenors later filed a second amended complaint against AFSCME, Attorney General Madigan, and Michael Hoffman, the Acting Director of the Illinois Department of Central Management Services, alleging that the parts of the IPLRA that allow for the collection of agency fees violate the First Amendment. Pet. App. 8a–27a. The district court dismissed, concluding that the case was controlled by *Abood*. Pet. App. 6a–7a. The Seventh Circuit affirmed the dismissal of petitioner's claim under *Abood*, while also holding that the other intervenor's claim was barred by claim preclusion. Pet. App. 1a–5a.

SUMMARY OF ARGUMENT

I. The government has broad discretion as an employer to determine how to manage its workforce. In particular, this Court has consistently held that state regulations of public-employee speech do not implicate the First Amendment if they affect only the speech of employees *qua* employees. Indeed, even when such regulations restrict employees' ability to speak as citizens on matters of public concern, they are not subject to heightened scrutiny but are instead reviewed under a balancing test that gives great weight to the interests of the State as an employer. Similarly, this Court has repeatedly held that the government may require the payment of fees to support speech by a mandatory association, as long as (1) the funded activities further the regulatory interests that justify the association, and (2) those interests are independent from the association's speech.

Agency fees that support the representational activities of a public employee union—contract negotia-

tion, contract administration, and grievance adjustment—are supported by these well-established principles. Such fees are assessed as a condition of employment and promote the government's distinctive interests as an employer. *Abood*'s central holding—that mandatory fees may permissibly support a union's employment-related activities but not its political or ideological speech—tracks precisely the fundamental distinction between government as employer and government as sovereign. In addition, the activities funded by agency fees serve the same workplace-management purposes that justify the State's recognition of the underlying association among employees. Consequently, a State's decision to allow a public employee representative to collect agency fees is entitled to the same broad deference that attaches to every other action taken by the State as an employer.

That deference should not be accorded, however, to agency fees that fund lobbying or other speech in a public forum that is not directed to the government as employer. To the extent that the plurality opinion in *Lehnert* suggested that such deference is appropriate, that conclusion should be revisited in an appropriate case. This is not such a case, though, because petitioner has chosen instead to argue that agency fee provisions are unconstitutional in all of their applications.

That sweeping argument is without merit. Petitioner overlooks the basic distinction between government as employer and government as regulator. Cases involving compelled expressive association, compelled speech, and campaign expenditures are inapposite here because in those cases the government acted as a sovereign to regulate the speech of

citizens. Likewise, cases invalidating patronage-based employment schemes are not controlling because agency fees do not coerce belief or require overt speech with which an employee disagrees. And neither *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), nor *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014), holds that agency fees are subject to heightened scrutiny when they apply to a traditional public workplace, as here.

II. Agency fees are justified by the State's interest in dealing with a fairly and adequately funded exclusive representative. Both Congress and this Court have long recognized that exclusive representation contributes to stable and effective labor-management relations. The exclusive representative provides the government with a counterparty that can aggregate employee preferences, convey accurate information, and resolve workplace disputes.

The duty of fair representation, which requires the union to work on behalf of all employees, is a crucial corollary to exclusive representation. The State has a powerful interest in ensuring that the costs of carrying out that duty are borne equally by all represented employees. Without agency fees, many employees—supporters and opponents of the union alike—would have an incentive to opt out of paying for what the union is legally obligated to provide to them. The State is entitled to conclude that the resulting disparity and resentment would disrupt the workplace. The First Amendment should not be held to mandate that outcome.

Agency fees constitute only a limited impingement on dissenting employees' First Amendment interests.

The activity funded by such fees occurs exclusively within the employment setting. Although unions do address some matters of public concern at the negotiating table, in that setting they are speaking to an employer on behalf of employees. In addition, much of the speech involved in collective bargaining—and most or all of the speech involved in grievance adjustment—does not involve matters of public concern. The across-the-board relief petitioner seeks would constitutionalize every workplace grievance, in direct violation of this Court's repeated admonitions.

Agency fee requirements do not threaten the vitality of public debate. They do not restrict any expression, prescribe any orthodoxy, or convert employees into mouthpieces for any message. Nor do they create an expressive association between the union and dissenting employees. Rather, they play an important role in the system by which many States have chosen to manage their workforces.

III. Petitioner has not come close to establishing a special justification for departing from *stare decisis*. On the contrary, *Abood* has engendered an extraordinary degree of reliance on the part of States, government employers, employees, and unions. Ordinary line-drawing difficulties associated with the distinction between chargeable and non-chargeable expenses do not warrant obliterating that distinction altogether; at most, they counsel revisiting aspects of *Lehnert*'s holding in an appropriate case. Perhaps most worryingly, overruling *Abood* would undermine several areas of First Amendment law, including the

principle that the government enjoys wide discretion as an employer to structure its own workplace.[1]

ARGUMENT

I. The use of agency fees to support a public-sector union's representational activities is not subject to heightened First Amendment scrutiny.

More than 40 years ago, this Court drew a line in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), holding that a State may require government employees to pay a proportionate share of the costs associated with exclusive representation but may not require them to subsidize the representative's political or ideological activities. That holding was consistent with the First Amendment at the time, and it remains so today.

Abood's approval of limited agency fees fits comfortably with a long line of this Court's precedents, both before and since, holding that conditions placed on government employment are permissible as long as they reasonably promote the government's legitimate interests as an employer. At the same time, *Abood* correctly prohibited compelled support for political and ideological causes in light of the greater scrutiny that applies when the government reaches beyond the employment relationship and compels financial

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[1] As respondent AFSCME has argued, AFSCME Br. Opp. 13–17, the district court's decision to allow petitioner to intervene in a matter over which it lacked jurisdiction was inconsistent with this Court's decision in *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914).

support for citizen speech on matters of public concern.

Petitioner goes astray at the outset by ignoring this fundamental distinction between government as employer and government as regulator. In his view, heightened scrutiny applies to all public-sector agency fees because *everything* funded by such fees—from negotiating holiday schedules to establishing employee training programs to resolving individual workplace grievances—counts as core citizen speech. That is simply wrong, both as a matter of fact and as a matter of law. The negotiating table, the government office, and the arbitrator's conference room are not public forums for citizen speech, and in many cases what is said in those settings has no broader significance. When a State provides for shared funding of contract negotiation and administration, it is acting as an employer managing its employees, not as a sovereign regulating the speech of its citizens. Employees in the same bargaining unit are already associated with one another for purposes of the State's management of its workforce, and it is well-established that the State may charge a fee to support activities in furtherance of the interests served by such an association.

A decision subjecting agency fees to heightened scrutiny would upend decades of First Amendment law ranging far beyond public-sector unions, and would imperil the long-recognized authority of States as employers to place reasonable conditions on public employment. It would also inappropriately displace the policy judgment of more than 20 state legislatures about how best to promote their interests in having an efficient and effective public workforce. The

Court should decline petitioner's invitation to subject all agency fees to strict or exacting scrutiny.

A. The Constitution permits States to place reasonable conditions on government employment.

This Court has "long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage [its] internal operation." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (internal quotations omitted; alteration in original). This difference "has been particularly clear in [the Court's] review of state action in the context of public employment." *Ibid.* Accordingly, "[t]ime and again [the Court has] recognized that the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (internal quotation omitted); *see also Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion) ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."). In view of the government's substantial interest in effectively and efficiently discharging its official duties, this Court has consistently accorded it wide discretion to manage its personnel and internal affairs. *Connick v. Myers*, 461 U.S. 138, 150–51 (1983); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011) ("government has a substantial

interest in ensuring that all of its operations are efficient and effective").

In particular, this Court has consistently held that States have substantial latitude to adopt and enforce policies in their capacity as employers that restrict the speech of government employees. In a line of cases beginning with *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court has set forth a two-step framework for reviewing regulations of public-employee speech. At the first step, the court asks whether the employee spoke as a citizen on a matter of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). "If the answer is no, the employee has no First Amendment cause of action." *Ibid.* In other words, when an employee speaks as an employee rather than as a citizen, that speech enjoys no First Amendment protection at all. *Id.* at 421; *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014); *Borough of Duryea*, 564 U.S. at 386.

But "[e]ven if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged." *Ibid.* Instead, the court proceeds to the second step of the *Pickering* analysis, asking "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. The sufficiency of the State's justification will vary depending on the nature of the employee's speech, *Connick*, 461 U.S. at 150, but the background presumption is that a "citizen who accepts public employment 'must accept certain limitations on his or her freedom,'" *Borough of Duryea*, 564 U.S. at 386 (quoting *Garcetti*, 547 U.S. at 418). Thus, even when

the employee speaks as a citizen, speech-restrictive policies are subject not to heightened scrutiny but to a test that turns on a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

The same pattern holds true for other constitutional rights: the Court has repeatedly applied a balancing or reasonableness test to uphold conditions of public employment that would be subject to heightened scrutiny had they been imposed generally by the State in its capacity as a regulator. Thus, for instance, the Court has allowed public employers to search workers' employer-issued electronic devices without a warrant if the search is "motivated by a legitimate work-related purpose" and is "not excessively intrusive in light of that justification." *City of Ontario v. Quon*, 560 U.S. 746, 764 (2010). Similarly, the Court upheld a public employer's search of an employee's desk without a warrant or probable cause after balancing "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *O'Connor v. Ortega*, 480 U.S. 709, 719–20 (1987) (plurality opinion); *id.* at 732 (Scalia, J., concurring in the judgment) ("government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment").

For the same reason, the "class of one" theory of equal protection, which binds the government in its role as regulator, *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000), does not bind public employers, in light of the "unique considerations applicable when the government acts as employer as opposed to sovereign," *Engquist*, 553 U.S. at 598. And the right of informational privacy does not protect government workers against having to fill out an intrusive background-check questionnaire as a condition of employment. *Nelson*, 562 U.S. at 151 (upholding "reasonable, employment-related inquiries that further the Government's interests in managing its internal operations."); *see also Kelley v. Johnson*, 425 U.S. 238, 244–45 (1976) (assuming police officer's claim of constitutional right not to cut his hair stated a liberty interest but rejecting claim because plaintiff was regulated "not as a member of the citizenry at large, but on the contrary as an employee of the police department").

Moreover, this Court has made clear that the government need not show that the conditions it places on public employment are the least restrictive means of achieving its goals. *See Nelson*, 562 U.S. at 153–55 (rejecting least-restrictive-means test and noting that deferential "analysis applies with even greater force where the Government acts, not as a regulator, but as the manager of its internal affairs . . . . within the wide latitude granted the Government in its dealings with employees"). Nor is the government forced to wait until the workplace is disrupted before it may take steps to prevent such disruption. *See Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 676 (1996) (Court has "consistently given greater deference to

government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large") (quoting *Waters*, 511 U.S. at 673); *Connick*, 461 U.S. at 152 ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.").

In short, when the government acts as an employer, the restrictions it imposes on employee speech are not subject to First Amendment scrutiny. And as long as the State has an "adequate justification" grounded in its interests as an employer, *Garcetti*, 547 U.S. at 418, even restrictions on citizen speech are subject only to a balancing test, and are generally upheld. *See Umbehr*, 518 U.S. at 677 (describing *Pickering* as involving "a *deferential* weighing of the government's *legitimate* interests") (emphasis added); *see also United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 99 (1947) (upholding Hatch Act's restrictions on political activity by federal employees); *id.* at 102 ("The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power."); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) ("unhesitatingly reaffirm[ing]" *Mitchell*). It is only when the government reaches beyond its interests as an employer and tries to exploit the employment relationship "to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens," that

heightened First Amendment scrutiny takes effect. *Garcetti*, 547 U.S. at 419.

B. The government may require the payment of a fee to support the activities of a mandatory association.

In a complementary line of cases decided since *Abood*, this Court has upheld the constitutionality of laws that recognize or establish a mandatory association and require the payment of fees to defray the costs of that association, even outside the employment context. In each of these cases, this Court has acknowledged the First Amendment interests of dissenters but concluded that the government's interest in the effective operation of the association justified the limited impingement on those interests. The rule that emerges from these cases is that the government may require the payment of fees to support such an association if (1) the funded activities are germane to the regulatory interests that justify the association, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557–59 (2005), and (2) those interests are "independent from the speech [of the association] itself," *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001).

These precedents have recognized the government's interest in ensuring that those who benefit from an association share in its costs. For example, in *Keller v. State Bar of California*, 496 U.S. 1, 15–16 (1990), the Court unanimously upheld the use of compulsory member dues by an integrated bar to fund improvements in the quality of legal services and regulation of the profession, while making clear that such dues may not be used to finance political and

ideological speech unrelated to those purposes. Relying on the reasoning of *Abood*, *id.* at 9–10, the Court emphasized the need to "prevent free riders" and explained that "[i]t is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort," *id.* at 12.

The Court later clarified that compulsory fees are permitted when they serve legitimate regulatory interests apart from the government's desire to favor a particular message. In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), the Court upheld an order by the Secretary of Agriculture requiring tree fruit producers to finance generic advertising. Relying on *Abood* and *Keller*, *id.* at 471–73, the Court emphasized that fees were assessed "as a part of a broader collective enterprise in which [producers'] freedom to act independently is already constrained by the regulatory scheme," *id.* at 469. And in *United Foods*, 533 U.S. 405, the Court reaffirmed *Glickman*'s holding while invalidating mandatory assessments for mushroom advertising because, unlike the cooperative marketing program in *Glickman*, the advertising itself was the "principal object of the regulatory scheme," *id.* at 412, and the assessments were not "ancillary to a more comprehensive program restricting marketing autonomy," *id.* at 411.

Finally, in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court, again noting the central relevance of *Abood* and *Keller*, held that a public university may assess fees to support student activities on a viewpoint-neutral basis, even though it was

"all but inevitable that the fees [would] result in subsidies to speech which some students find objectionable." *Id.* at 231–33. The Court held that the First Amendment does not require the State to "allow each student to list those causes which he or she will or will not support," because such an approach "could be so disruptive and expensive that the program to support extracurricular speech would be ineffective." *Id.* at 232.

C. Agency fees are conditions of public employment that support the costs of a mandatory association.

Public-employee agency fees stand at the intersection of these two lines of cases and are supported by the holdings in both.

First, agency fees are paid by government employees "as a condition of employment." *Abood*, 431 U.S. at 211. As *Abood* recognized, although such fees do give rise to an "impingement upon associational freedom," *id.* at 225, that impingement is justified by the government's distinctive interests as an employer in avoiding the workplace disruption that would arise if the costs of fairly representing all employees were not fairly distributed among those who are represented, *id.* at 222–32. *See infra* II.A.2. The conduct supported by agency fees—contract negotiation, contract administration, and grievance adjustment—is undeniably directed to the government in its capacity as employer, and is entirely employment-related in that it occurs within the employment relationship and has "some potential to affect the [government] entity's operations." *Garcetti*, 547 U.S. at 418. And obviously no one other than an employee or his or her

representative may bargain with the government over the terms and conditions of his or her employment, file a grievance with a public employer, or object to discipline imposed by that employer.

Petitioner protests that the Court has not viewed *Abood* through the lens of the employee-speech cases, Pet. Br. 22 (quoting *Harris*, 134 S. Ct. at 2641), but the Court's analysis in *Abood* is firmly grounded in the animating principle of those cases. The holding of *Abood*—that agency fees may be used for "collective bargaining, contract administration, and grievance adjustment," 431 U.S. at 225–26, but not for "political and ideological purposes unrelated to collective bargaining," *id.* at 232—closely tracks *Pickering*'s distinction between government as employer and government as regulator. As long as agency fees are devoted to employment-related purposes, *Abood* held, they are justified by the government's interest as an employer in dealing with a single representative and preventing free-riding. *Id.* at 220–32. But when the government reaches beyond its prerogatives as an employer and seeks to affect citizen speech on political and ideological subjects, judicial deference is diminished. *Id.* at 232–37. To put it in the terms used by one of *Pickering*'s successor cases, in disapproving fees for political or ideological speech *Abood* recognized that "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419.

Unsurprisingly, *Pickering* and other employee-speech cases figured prominently in the way *Abood* was litigated in this Court. The objecting employees

in *Abood*, like petitioner here, argued that their case was "governed by a long line of decisions holding that public employment cannot be conditioned upon the surrender of First Amendment rights." 431 U.S. at 226. Their brief relied extensively on *Pickering* and other cases involving the expressive rights of public employees, such as *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *See* Appellants Br. 27, 35, 38 (No. 75-1153). For its part, the appellee school board repeatedly cited *Pickering* in defense of agency fees. *See* Appellee Br. 16–17, 42, 43 (No. 75-1153). The *Abood* Court cited *Pickering*, 431 U.S. at 230 n.27; *see also id.* at 259 (Powell, J., concurring in the judgment), as well as *Sindermann* and *Keyishian*, *id.* at 233–34, and *City of Madison School Dist. v. Wisconsin Empl. Relations Comm'n*, 429 U.S. 167 (1976), another *Pickering* case, 431 U.S. at 230. And the Court has since grouped *Abood* together with *Sindermann*, *Keyishian*, and other employee-speech cases. *See Umbehr*, 518 U.S. at 674–75.

Petitioner tries to distinguish the *Pickering* line of cases by suggesting that *restricting* employee speech is an inherently reasonable managerial policy whereas *requiring* payment of a fee to support the activities of an exclusive representative is not. Pet. Br. 24; *see also* U.S. Br. 24. That argument makes no sense. A policy that requires employees to share the costs of fair representation is, if anything, less speech-restrictive and more closely tied to workforce management than one that penalizes employees for engaging in core political speech outside the workplace, such as writing a letter to a local newspaper, *Picker-*

ing, 391 U.S. at 566. If the latter is subject to a balancing test, *a fortiori* so is the former.

In fact, even if agency fee provisions were deemed to compel speech as opposed to merely requiring shared financial support for employment-related activities, petitioner's argument would still amount to a distinction without a difference. As this Court has observed, while "[t]here is certainly some difference between compelled speech and compelled silence, . . . in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 796–97 (1988). And petitioner's additional contention (Pet. Br. 23) that *Pickering* applies only when the government has a sufficient interest to overcome an employee's speech interests is simply circular: that is the inquiry required by *Pickering*'s second step, not a threshold requirement for the *Pickering* test to apply.

Nor does it make any difference that agency fees support speech on behalf of an entire class of employees rather than taking effect on an *ad hoc* basis. First of all, it is unclear whether this distinction is even a meaningful one. Courts often rely on the *Pickering* test to uphold the enforcement of generally applicable workplace policies. *See, e.g., City of San Diego v. Roe*, 543 U.S. 77, 79, 84–85 (2004) (upholding application of police department policies to individual employee); *Commc'ns Workers of Am. v. Ector Cty. Hosp. Dist.*, 467 F.3d 427, 441–42 (5th Cir. 2006) (upholding application of policy prohibiting hospital employee from wearing "Union Yes" pin at work); *Knight v.*

Connecticut Dep't of Pub. Health, 275 F.3d 156, 162, 164–65 (2d Cir. 2001) (upholding application of policy preventing interpreters from proselytizing on the job). Conversely, agency fees often fund union activities that relate to a single employee, such as grievance adjustment.

In any case, actions taken by the State in its capacity as employer do not lose that character by virtue of their broad applicability. *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), in which the Court struck down a prohibition on federal employees receiving honoraria, proves the point. The United States cites *NTEU* in support of its argument that *Pickering* is inapplicable here because agency fees apply to a "broad category of expression by a massive number of potential speakers," while the typical *Pickering* case involves "*post hoc* analysis of one employee's speech." U.S. Br. 24 (quoting *NTEU*, 513 U.S. at 466–67). But this argument fails at the outset because, contrary to the United States' suggestion, *NTEU* applied a balancing test; the "wholesale" nature of the restriction did not trigger strict scrutiny. *See* 513 U.S. at 468–77. Rather, the Court held that the honoraria ban, which prohibited speech that had "nothing to do with [the employees'] jobs and [did] not even arguably have any adverse impact on the efficiency of the offices in which they work," *id.* at 465, was not a "reasonable response" to concerns about operational efficiency, *id.* at 473, 476. Agency fees, by contrast, do not restrict any employee's right to speak in any public forum on any subject and are justified by the State's interest as an employer in effectively managing its workforce.

Second, agency fees support the activities of a mandatory association. Public employees in a single bargaining unit are already associated with one another for employment-related purposes because they work for the same employer and are represented by the same bargaining agent.[2] As discussed *infra* II.A.1, this Court has repeatedly recognized the government's strong interest in certifying bargaining units for purposes of exclusive representation, including in the public sector. *See, e.g., Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291 (1984). Unlike the assessments invalidated in *United Foods*, which were unmoored from any larger regulatory purpose and which paid for speech the government favored, 533 U.S. at 411, 414, agency fees promote the government's interest in managing its workforce and do not require individuals to subsidize any particular message.

Abood's distinction between the chargeable expenses of contract negotiation and administration and the non-chargeable expenses of political or ideological speech is consistent with the governing standard for mandatory associations, which asks whether the challenged fee supports activities that further the non-speech-related interests justifying the association. It is no wonder, then, that the mandatory association cases rely heavily on *Abood*'s reasoning. *See, e.g., Keller*, 496 U.S. at 12–17; *Glickman*, 521

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[2] Employees may form a bargaining unit only if their "collective interests may suitably be represented by a labor organization for collective bargaining." 5 ILCS 315/3(s)(1); *see also* 5 ILCS 315/9(b) (listing factors guiding determination of appropriate bargaining unit).

U.S. at 471–73. For that reason, as discussed *infra* III.C, subjecting all agency fees to heightened scrutiny would create an irreconcilable conflict with the principles on which these decisions are grounded.

D. The use of agency fees to support lobbying and other speech directed to the government as a sovereign is not entitled to judicial deference.

As explained, agency fees that support a public sector union's contract negotiation, contract administration, and grievance adjustment activities are justified by the government's interest as an employer in managing its workforce. The speech that inheres in those activities is directed to the government as an employer, not as a sovereign, and the government accordingly has wide latitude to place reasonable conditions on it, including a shared funding requirement.

By contrast, when a union engages in lobbying or other speech that occurs in a public forum or is directed to the government as a sovereign, the constitutional analysis shifts considerably. State laws that place restrictions on, or mandate private support for, such speech are no longer insulated by the State's "much freer hand in dealing with citizen employees than it [has] when it brings its sovereign power to bear on citizens at large." *Nelson*, 562 U.S. at 148 (internal quotation omitted). Instead, such laws present the risk that the State has acted "to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419.

The distinction that *Abood* outlined between chargeable and non-chargeable expenses was grounded in this basic distinction. 431 U.S. at 232–37. And *Lehnert* aimed to build upon the same insight in holding that agency fees may not be used to fund "lobbying activities [that] relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally," 500 U.S. at 520 (opinion of Blackmun, J.); *id.* at 559 (Scalia, J., concurring in the judgment in part and dissenting in part) (agreeing that "the challenged lobbying expenses are nonchargeable").

But the *Lehnert* plurality erred insofar as it suggested that chargeable fees may properly include union expenses for activities that take place "in legislative and other 'political' arenas." *Id.* at 520 (opinion of Blackmun, J.) (quoting *Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388, 1392 (6th Cir. 1989)). Such activities, even if they may redound to the benefit of represented employees, are not undertaken as part of the employment relationship. Accordingly, mandatory funding of those activities is not entitled to the judicial deference that attaches to actions taken by the government as employer. *See Garcetti*, 547 U.S. at 419 (when employees speak "as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.").

Whether the *Hudson* notice in this case indicates that petitioner may have been charged for some activities best characterized as lobbying or speech in a public forum is a narrow, fact-intensive inquiry that petitioner chose not to pursue. *See, e.g.*, Pet. App. 29a

(item 5: charge for "public advertising of AFSCME's positions"); *id.* (item 6: charge for "[l]obbying for the negotiation, ratification or implementation of" CBA); Pet. App. 30a–31a, 32a (item 26: partial charge for lobbying for other purposes, subject to *Lehnert* criteria). Petitioner could have disputed these or other charges under Illinois law with a simple written challenge, *see* 80 Ill. Admin. Code § 1220.100; Pet. App. 40a–41a. If such a state-court challenge proved unsuccessful, or if a plaintiff presented an as-applied federal constitutional challenge to such charges on an adequate factual record, this Court would have an opportunity to revisit the line drawn in *Lehnert* between chargeable and non-chargeable expenses. *See generally* Fried & Post Amicus Br. 22–27.

Rather than challenge AFSCME's *Hudson* notice, however, petitioner chose to argue in federal court that *all* agency fees violate the First Amendment, Pet. App. 22a–23a (¶¶ 64–67), and that the state laws authorizing them are unconstitutional both on their face and as applied, *id.* at 24a (¶ 72). As the next section of this brief explains, that argument—which includes within its sweep a broad range of contract negotiation, contract administration, and grievance adjustment activities—is wildly overstated and inconsistent with governing precedent. If adopted, it would unsettle First Amendment doctrine far beyond *Abood* and would threaten the States' well-established prerogatives as employers to manage their workforces.

E. Petitioner's arguments for subjecting all agency fees to heightened scrutiny are without merit.

Petitioner's challenge to *Abood* rests on his assertion that every use of agency fees in the public sector is subject to heightened First Amendment scrutiny. Pet. Br. 10–26. This argument loses sight of the fundamental distinction between government as employer and government as regulator. Thus, for example, the cases cited by petitioner (Pet. Br. 19) in which the Court applied strict scrutiny to instances of compelled expressive association, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995), are inapposite because the government there acted not as an employer but, instead, as a regulator to substantially impair the ability of private groups to express their chosen messages to the public. Likewise, the cited cases involving compelled speech (Pet. Br. 20–21) and expenditures on political campaigns (Pet. Br. 21) are irrelevant, as they have nothing to do with the employment relationship.

Petitioner attempts to draw a parallel between agency fees and compelled political association (Pet. Br. 20), but the comparison is unpersuasive. The Court has invalidated patronage-based employment schemes only after concluding that the interests that motivate them "are not interests that the government has in its capacity as an employer" but "interests the government might have in the structure and functioning of society as a whole." *Rutan v. Republican Party*, 497 U.S. 62, 70 n.4 (1990). For that reason, contrary to petitioner's suggestion (Pet. Br. 20), this Court has

not applied "exacting scrutiny" to all political affiliation requirements. "[R]ather, the question is whether the hiring authority can demonstrate that party affiliation is an *appropriate requirement* for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (emphasis added); *see also Rutan*, 497 U.S. at 64 (First Amendment forbids patronage-based discharge "unless party affiliation is an *appropriate requirement* for the position involved") (emphasis added); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996) ("the inquiry is whether the affiliation requirement is a *reasonable* one") (emphasis added).

The patronage schemes invalidated by this Court have extracted from objecting employees "a pledge of allegiance to another party," *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality opinion), and even required them to campaign for the election of that party's candidates, *ibid.*; *see also Rutan*, 497 U.S. at 67 (employee punished for failing to work for political party); *O'Hare*, 518 U.S. at 715–16 (city terminated relationship with contractor who refused to contribute to mayor's reelection campaign). Agency fees that support the employment-based activities of an exclusive representative share none of the objectionable attributes of a patronage system, as they are motivated by the government's interests as an employer and neither coerce belief nor require overt speech or action in support of any position with which an employee disagrees. The political affiliation cases therefore provide no basis for the application of heightened scrutiny here.

Petitioner also relies on language from *Knox* and *Harris* (Pet. Br. 18–19), but those cases do not hold

that all public-sector agency fees are subject to heightened scrutiny. In *Knox*, a union imposed an extraordinary mid-year special assessment for *non-chargeable, political expenses* associated with a statewide special election. 567 U.S. at 303–305. Nonmembers who had failed to object to the most recent regular dues payment were not permitted to opt out of the special assessment, and those who had objected were required to pay the special assessment at the most recent agency-fee rate of 56.35%. *Id.* at 305–306, 314. Tellingly, the State did not attempt to defend the special assessment, even as an amicus. Finding "no justification" for this attempted expansion of *Abood*, *id.* at 314, 321, the Court held that the union was obligated to provide a fresh *Hudson* notice to enable nonmembers to decide whether to pay the assessment, *id.* at 322.

Similarly, in *Harris*, this Court declined to "approve a very substantial expansion of *Abood*'s reach," 134 S. Ct. at 2634, that would have encompassed home health-care personal assistants who did not work together in the same public facility, *id.* at 2640; who were hired, supervised, and subject to discharge by a "customer" (often a close relative), *id.* at 2624, 2634; and whose union's ability to bargain on their behalf was "sharply limited" by law, *id.* at 2635–36, 2637 n.18. Given all of these facts suggesting that the State was "not acting in a traditional employer role," the Court held *Pickering* inapplicable, *id.* at 2642, and found that the State's putative interests as an employer would be insufficient even if *Pickering* applied, *id.* at 2642–43. The Court expressly declined to revisit *Abood*. *Id.* at 2638 n.19. In short, neither *Knox* nor *Harris* applied heightened scrutiny to all

uses of agency fees to support a union's activities in a traditional public-sector workplace, as petitioner asks the Court to do here.

To the extent *Knox* and *Harris* contain language suggesting that all agency fees should be subject to heightened scrutiny, that language was unnecessary to those decisions and is at odds with controlling precedent. In *Knox*, for instance, the Court read *United Foods* as applying "exacting First Amendment scrutiny," under which mandatory fees must be a "'necessary incident'" of the government's "'regulatory purpose.'" *Knox*, 567 U.S. at 310 (quoting *United Foods*, 533 U.S. at 414); *see also Harris*, 134 S. Ct. at 2639 (relying on *Knox*). But *United Foods* does not apply—indeed does not mention—"exacting scrutiny." *Knox* wrenched the "necessary incident" language out of context: the quoted passage from *United Foods* merely described the subsidy for the integrated bar association's speech in *Keller* as a "necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity." *United Foods*, 533 U.S. at 414. As *United Foods* made clear in its very next sentence, "[t]he central holding in *Keller* . . . was that the objecting members were not required to give speech subsidies for matters not *germane to the larger regulatory purpose* which justified the required association." *Ibid.* (emphasis added).

Likewise, *Knox* misinterpreted this Court's decision in *Roberts* to mean that "mandatory associations are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 567 U.S. at 310 (quoting *Roberts*, 468 U.S. at 623). *Roberts* held that heightened scru-

tiny applies when the government forces an *expressive* association "to accept members it does not desire," which "may impair the ability of the original members to express only those views that brought them together." 468 U.S. at 623. That holding has no application to associations that are brought together for reasons "independent from the speech itself," *United Foods*, 533 U.S. at 415, or laws that merely require shared funding as opposed to mandating acceptance of unwanted members—let alone circumstances in which the government acts as an employer. The statements in *Knox* and *Harris* concerning heightened scrutiny are not controlling here.

II. Agency fees in support of a union's representational activities are a permissible condition of public employment.

As explained, agency fees are a condition of public employment authorized by the State in its capacity as an employer. Such fees support the work of contract negotiation, contract administration, and grievance adjustment—transactional, employment-related activities that occur in specialized settings established by the State for the purpose of managing its workforce. To the extent this conduct by the exclusive representative is expressive, it is far removed from the core political speech in which public employees might wish to engage as citizens—and in which they remain free to engage, agency fees notwithstanding. As *Abood* recognized, such fees do give rise to a limited "impingement" on the First Amendment interests of employees who sincerely object to the union's positions. 431 U.S. at 225. That impingement, however, is justified by the State's substantial interest in dealing with a single representative and ensuring that

the obligation of funding that representative is borne fairly by all of the employees it has a duty to represent.

A. Agency fee provisions are justified by the State's substantial interest in dealing with a fairly and adequately funded exclusive representative.

1. The State has a well-recognized interest as an employer in dealing with an exclusive representative.

Exclusive representation and the correlative duty to fairly represent all employees in the bargaining unit are central pillars of the system of industrial relations adopted by Congress more than 80 years ago in the National Labor Relations Act (NLRA). 29 U.S.C. § 159(a); *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988). When Congress amended the NLRA in the Taft-Hartley Act of 1947, it outlawed the "closed shop," in which an employer agrees to hire only union members. *Id.* at 748. But at the same time Congress recognized, as one of that Act's authors put it, that "if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself." *Ibid.* (quoting 93 Cong. Rec. 4887 (1947) (Sen. Taft)). To remedy that inherent collective action problem, Congress authorized employers to agree to "union-security provisions" that provide for agency fees. 29 U.S.C. § 158(a)(3). *See NLRB v. General Motors Corp.*, 373 U.S. 734, 740–41 (1963).

The NLRA does not cover public employees, 29 U.S.C. § 152(2), and for the first few decades after its

enactment most States did not bargain with their employees' unions. Most public-sector collective bargaining laws were passed in the 1960s and 1970s in response to increased unrest among public employees. Modeled on the NLRA, those laws protect the right of employees to designate an exclusive bargaining agent by majority vote and impose on that agent a corresponding duty to fairly represent all employees in a bargaining unit. Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1900-1962*, at 71–72 (2004).

This Court has repeatedly recognized the State's interest as an employer in dealing with an exclusive representative. *See, e.g., Knight*, 465 U.S. at 291 ("The goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when negotiating.") (internal quotation marks omitted); *Abood*, 431 U.S. at 220–21. Exclusive representation allows the government to consolidate the process of bargaining about individual terms and conditions of employment into a single collective endeavor. The representative organizes and channels the concerns and priorities of employees, reconciling conflicting views and conveying information about employee preferences to the government more efficiently and reliably than could be achieved if the employer sought to discover those preferences on its own. With the participation of an exclusive representative, the government can establish employment terms in a more durable and stable manner than if it imposed those terms unilaterally.

Exclusive representation in the public sector has also proven effective in avoiding strikes.[3]

The exclusive representative plays a crucial role in resolving workplace disputes. Disagreements that arise over working conditions or workplace discipline can be resolved more efficiently when the employee speaks through a union representative with experience in such matters. *See* JA 126–29 (CBA provisions detailing multiple steps grievant must take prior to arbitration). The representative can ensure that grievants with similar claims are treated similarly, and can help settle grievances at an early stage. *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). If the representative were not available to assist in the process, "a significantly greater number of grievances would proceed to arbitration," which "would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." *Id.* at 191–192 (footnote omitted). Overall, as the Court recognized in *Harris*, "the duty to provide equal and effective representation for nonmembers in grievance proceedings . . . [is] an undertaking that can be very involved." 134 S. Ct. at 2637.

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[3] *See, e.g.*, Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J.L. & Econ. 519, 520–21 (1994); Martin H. Malin, *Public Sector Collective Bargaining: The Illinois Experience* 4 (N.E. Ill. Univ. Ctr. for Governmental Studies Policy Profiles, Jan. 2002); Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 Cornell J. of L. & Pub. Pol'y 735, 744 (2009).

Beyond the formal processes of contract negotiation and administration, the employer and the representative can build working relationships over the course of years, facilitating informal processes that benefit both sides. *See* JA 143–45 (providing for labor-management meetings to discuss and solve problems of mutual concern). Employers also get employee feedback through the representative that may otherwise be unavailable, as employees may be more candid when talking to a union representative than when speaking directly to management. The representative can often communicate the employer's positions or priorities more credibly than the employer could do directly, and can generate buy-in for contract terms among rank-and-file employees. Studies support the conclusion that this collaborative process tends to produce greater employee acceptance of the employer's policies, which in turn leads to fewer resource-consuming disputes, higher morale, and enhanced productivity.[4]

To ensure that the exclusive representative provides these benefits to public employers, the State imposes on the union a correlative duty of fair representation. Under Illinois law, the exclusive representative is "responsible for representing the interests of all public employees in the unit," whether or not they are union members. 5 ILCS 315/6(d); 115 ILCS

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[4] *See, e.g.*, Sally Klingel & David B. Lipsky, Joint Labor-Management Training Programs for Healthcare Worker Advancement and Retention, at 4 (2010), goo.gl/eZ8Zr3; U.S. Secretary of Labor's Task Force on Excellence in State and Local Gov't Through Labor-Management Cooperation, Working Together for Public Service: Final Report (May 1996), at 2, goo.gl/Wi8kBz.

5/14(b)(1). Without a duty of fair representation, government employers would lose the benefit of bargaining with a single party that represents all employees, and would be faced with the workplace dissension and resentment that predictably would arise if unions could act solely in the interests of their own members.[5]

2. The State has a substantial interest in ensuring that the representative is fairly and adequately funded.

The important benefits that exclusive representation provides to public employees and their government employers do not come free of charge. As *Abood* noted, collective bargaining often requires the "services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." 431 U.S. at 221. Processing grievances entails costs for staff, legal representation, and the many expenses associated with arbitration. *See Vaca*,

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[5] Petitioner's broadside constitutional challenge to the entire concept of exclusive representation (Pet. Br. 48–52) not only goes beyond the scope of the question presented but is unfounded. It is well-established that the State's decision to bargain with a single employee representative does not restrain employees' freedom "to associate or not to associate with whom they please, including the exclusive representative." *Knight*, 465 U.S. at 288. Employees represented by an exclusive bargaining agent "are not compelled to act as public bearers of an ideological message they disagree with, accept an undesired member of any association they may belong to, or modify the expressive message of any public conduct they may choose to engage in." *Hill v. Service Emps. Int'l Union*, 850 F.3d 861, 865 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 446 (2017) (quoting *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016), *cert. denied*, 136 S. Ct. 2473 (2016)) (internal punctuation omitted).

386 U.S. at 191 (describing arbitration as "the most costly and time-consuming step in the grievance procedures"). Agency fees help to assure that adequate funds are available to perform these duties.

Just as important, agency fees fairly distribute the costs of exclusive representation by ensuring that they are borne equally by all of the employees who receive the benefits of that representation. *Beck*, 487 U.S. at 748–50; *Abood*, 431 U.S. at 221–22; *General Motors*, 373 U.S. at 740–41. In the absence of an agency fee requirement, rational employees—*including those who fully support the union's positions and benefit from its efforts on their behalf*—would have an economic incentive to opt out of paying their fair share of the costs of representation.

Petitioner tries to sidestep this common-sense conclusion by labeling himself a "forced rider[]" rather than a would-be free rider, Pet. Br. 53, but that label fundamentally misconceives the collective action problem that justifies agency fees. The free-rider problem is caused not only by the true dissenter but also by the rational employee who gladly accepts the benefits he derives from union representation and "wants merely to shift as much of the cost of representation as possible to other workers," *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir. 1989). The problem, of course, is that if support for collective representation were made wholly voluntary it would be virtually impossible, as a practical matter, to distinguish the sincere objector from the opportunistic free rider.

Research confirms what an elementary understanding of economics and human nature suggests:

free-ridership greatly increases when unions cannot collect agency fees. *See* Jeffrey H. Keefe, *On* Friedrichs v. California Teachers Association*: The Inextricable Links Between Exclusive Representation, Agency Fees, and the Duty of Fair Representation*, Briefing Paper No. 411 (Econ. Pol'y Inst., Washington, D.C.), Nov. 2, 2015, at 4–6 (summarizing research). Prohibiting agency fees "inhibits the formation of labor organizations and increases the likelihood they will fail once they are established, since free-riding will deprive a union of essential resources." *Id.* at 4, 8–13. In particular, evidence from States with so-called "right-to-work" laws shows that when employees have the option of becoming free riders, a great many of them do so, *including many who support the union*. *See* Raymond Hogler et al., *Right-to-Work Legislation, Social Capital, and Variations in State Union Density*, 34 Rev. Regional Stud. 95, 95 (2004) (empirical study concluding that right-to-work laws "have a strong, negative effect on union density that is independent of underlying attitudes toward unions").

Truncating a sentence from *Harris*, petitioner argues that "[t]he mere fact that nonunion members benefit from union speech is not enough to justify an agency fee. . . ." Pet. Br. 36 (quoting 134 S. Ct. at 2636). But as Justice Scalia went on to explain in the very passage from his separate opinion in *Lehnert* that is quoted in the rest of that sentence, nonunion employees are distinctive because "*they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphases in original). Unions,

unlike other voluntary associations, are legally forbidden to alleviate the free-rider problem by acting only in their members' interests. "Thus, the free ridership (if it were left to be that) would not be incidental but calculated, not imposed by circumstances but mandated by government decree." *Ibid.*

Petitioner's assertion that agency fees cannot be upheld if exclusive representation could survive without them, Pet. Br. 37–38, thus misses the point. As Justice Scalia recognized, the State has a "'compelling . . . interest'" in preventing the workplace "inequity" that would arise if it required unions to represent employees who did not pay their fair share for that representation. *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). If agency fees were eliminated, dues-paying union members—as a result of their own free associational choice—would be forced to subsidize their fellow employees who benefit from the union's representation but have chosen not to pay for it. A State may choose to enact that kind of intra-workforce cross-subsidy as a matter of public policy, but the First Amendment cannot sensibly be read to require it. At the very least, the State is entitled to prevent that unfair distribution of burdens—and reduce the risk of free-riding employees "stirring up resentment by enjoying benefits earned through other employees' time and money," *Ellis v. Railway Clerks*, 466 U.S. 435, 452 (1984)—by authorizing an agency fee requirement as a condition of employment.

In short, petitioner's contention that agency fees are unconstitutional because they are not necessary for exclusive representation, Pet. Br. 36, is both factually and legally unsound. Nothing on this record

supports that view, and the Court certainly cannot take judicial notice of it. Rather, it is beyond dispute that negotiating and administering a contract are costly tasks, *see Abood*, 431 U.S. at 221; *Vaca*, 386 U.S. at 191, and that a union cannot meet its representational obligations without sufficient resources. More broadly, this contention, like much of petitioner's argument, proceeds from the faulty premise that agency fees are subject to heightened scrutiny. As an employer, the State is entitled to conclude that its capacity to manage its workforce would be severely compromised if the obligation to fund the union's representational activities were not fairly borne by all employees. By the same token, petitioner's assertion that the government can have an interest only in dealing with a "weak and submissive" union, Pet. Br. 61, is not only short-sighted from a managerial perspective but also is inconsistent with the deference owed to "the government acting 'as proprietor, to manage [its] internal operation,'" *Engquist*, 553 U.S. at 598.

Petitioner also argues at length that exclusive representation confers benefits on unions, Pet. Br. 37–43, and that the costs of fair representation are overstated, Pet. Br. 45–47, but these arguments—beyond being unsupported by anything in the record—are similarly beside the point. Regardless of the precise costs entailed by the duty of fair representation, the inherent collective action problem remains, as does the State's interest as an employer in ensuring that those costs are fairly distributed among all of the employees to whom the duty extends.

B. Agency fees represent a limited impingement on employees' First Amendment interests.

As *Abood* recognized, agency fees have an "impact upon [objecting employees'] First Amendment interests." 431 U.S. at 222; *see also Knox*, 567 U.S. at 321; *Harris*, 134 S. Ct. at 2643. That impact, however, is limited in several decisive respects.

First, the speech that agency fees validly support occurs exclusively within the employment setting. Contract negotiation, contract administration, and grievance resolution take place in specialized channels of communication far removed from any traditional First Amendment forum. These processes occur behind closed doors, in a venue where the employer's representative is the only audience for the union's speech. *See* 5 ILCS 120/2(c)(2) (exception to Illinois Open Meetings Act providing that a public body may hold closed meetings to consider "[c]ollective negotiating matters between the public body and its employees or their representatives"); 5 ILCS 315/24 ("The provisions of the Open Meetings Act shall not apply to collective bargaining negotiations and grievance arbitration conducted pursuant to this Act."). The public employer controls whom it will listen to, when the discussion will take place, and which topics will be discussed. *Knight*, 465 U.S. at 291; 5 ILCS 315/4 ("[e]mployers shall not be required to bargain over matters of inherent managerial policy"). The union's speech in these settings thus "owes its existence to [the union's] professional responsibilities" in an environment the "employer itself has commissioned or created." *Garcetti*, 547 U.S. at 421. Moreover, both sides understand that the union is advancing

collective positions on behalf of the entire unit, not expressing the personal views of any employee. *Knight*, 465 U.S. at 276. And the overriding purpose of the representative's speech in these proceedings is to establish and enforce the terms and conditions of employment. *See id.* at 280 ("A 'meet and confer' session is obviously not a public forum."); *Lehnert*, 500 U.S. at 521 (opinion of Blackmun, J.) (contrasting "collective-bargaining negotiations" with "public fora open to all").

It is true, as *Abood* acknowledged, that collective bargaining in the public sector can address issues of public concern. 431 U.S. at 222, 231. But under the constitutional test applicable to the government's actions as an employer, that is not enough to give rise to a First Amendment claim. *Borough of Duryea*, 564 U.S. at 386; *Garcetti*, 547 U.S. at 418. Even if the entirety of public-sector bargaining were thought to address matters of public concern, the union would still be speaking as an employee representative to government as an employer—not as a citizen to a sovereign—in negotiating terms and conditions of employment.

Moreover, many of the matters addressed at the bargaining table have no particular ideological or political valence, even in the aggregate. Thus, for example, the CBA at issue here addresses such prosaic workplace issues as the annual holiday schedule (JA 154–60); compensation for an employee who is required by job assignment to work through an unpaid lunch period (JA 166); when corrections officers will be paid for roll call (JA 191-92); what happens when Daylight Savings Time changes to Standard Time, and vice versa, during an employee's shift (JA 193);

the number and content of personnel files (JA 292); and the establishment of committees to identify and correct unsafe or unhealthy conditions such as inadequate lighting or inadequate first-aid kits (JA 295). Subjecting all of these routine workplace issues to heightened First Amendment scrutiny "would subject a wide range of government operations to invasive judicial superintendence." *Borough of Duryea*, 564 U.S. at 390–91.

The same is even more self-evidently true of grievance adjustment, which deals exclusively with "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Id.* at 391. Arbitrated grievances rarely involve matters of public concern. *See, e.g.*, *Melanie Thompson*, 34 PERI ¶ 29, 2017 WL 3634394 (IELRB 2017) (grievance concerning change to sick leave policy); *Raymond Gora*, 30 PERI ¶ 91, 2013 WL 5973879 (IELRB 2013) (elimination of driver education hours); *SEIU, Local 73*, 31 PERI ¶ 7, 2014 WL 3108228 (ILRB 2014) (transfer of work location). And grievances that are resolved informally without arbitration are even less likely to involve the interests of anyone beyond the employee and his or her immediate workgroup. Petitioner's characterization of the grievance process as intrinsically "political" (Pet. Br. 14–15) thus cannot be taken seriously.

Indeed, this Court has long established that an individual employee pursuing a workplace grievance does not speak as a citizen and seldom vindicates matters of public concern. *See Borough of Duryea*, 564 U.S. at 398 ("A petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to

advance a political or social point of view beyond the employment context."); *id.* at 399 ("'a complaint about a change in the employee's own duties' does not relate to a matter of public concern"). One of the central lessons of *Pickering* and its progeny is that the First Amendment does not empower public employees to "'constitutionalize the employee grievance.'" *Garcetti*, 547 U.S. at 420 (quoting *Connick*, 461 U.S. at 154); *see also Borough of Duryea*, 564 U.S. at 391 (holding that application of Petition Clause to grievances not raising matters of public concern "would raise serious federalism and separation-of-powers concerns" and "consume the time and attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public"). Yet petitioner's facial attack on agency fees seeks to do just that.

Second, an agency fee requirement does not restrict any employee's freedom of expression. *City of Madison*, 429 U.S. at 175; *Lehnert*, 500 U.S. at 521 (opinion of Blackmun, J.); *see also Abood*, 431 U.S. at 230 (a "public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint"). Petitioner remains free to speak out against the union both in public and in the workplace, oppose its recertification, associate with like-minded groups, and lobby his elected representatives to amend or repeal the IPLRA or its agency-fee provisions. Unlike the regulations invalidated in the cases cited by petitioner, agency fees do not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), or require employ-

ees to act as vehicles for the State's ideological message, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Agency fee requirements thus pose "no threat to the free and robust debate of public issues" that the First Amendment is designed to protect. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citation and internal quotation marks omitted).

Third, agency fees do not compel any expressive association between the union and a nonmember employee. Such an employee is, of course, already associated with the union in the sense that the State requires the union to represent all employees in the bargaining unit. But no reasonable observer, upon being informed that an employee had paid a mandatory agency fee while refusing to support the union's political and ideological speech, would infer that the employee supported the union's expression. Quite the contrary: the most logical inference would be that he opposes it. *Cf. Rumsfeld v. FAIR*, 547 U.S. 47, 65 (2006) (noting that "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy") (citing *Board of Ed. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).[6]

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[6] Even if this Court were to overrule *Abood* and adopt heightened scrutiny, it should not invalidate agency fee provisions in all their applications. Under such circumstances, the appropriate disposition would be to announce the governing standard and remand to give respondents the opportunity to satisfy the new test. *See, e.g., Johnson v. California*, 543 U.S. 499, 515 (2005). As Justice Powell recognized in *Abood*, the State's interests are likely sufficient under heightened scrutiny to justify mandatory fees in support of many union activities,

III. There is no special justification for departing from *stare decisis*.

Abood was correctly decided. But even if the Court doubted that conclusion, *stare decisis* would counsel strongly against overruling a precedent that has stood for more than 40 years. To depart "from precedent is exceptional," *Randall v. Sorrell*, 548 U.S. 230, 244 (2006), and "even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure . . . to be supported by some 'special justification,'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996)). To satisfy his heavy burden, petitioner must articulate reasons for departing from *Abood* beyond his plea that the Court should decide it "differently now than [it] did then." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Rather than do that, petitioner rehashes critiques of *Abood* that could have been—and in many cases were—leveled at the time. *See Abood*, 431 U.S. at 254–64 (Powell, J., concurring in the judgment). The Court should reject this attempt to overturn settled precedent.

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including collective bargaining on "narrowly defined economic issues" and the "processing of individual grievances." 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment). Further fact-finding would be necessary here given the lack of an evidentiary record.

A. Overruling *Abood* would undermine the reliance interests of States, public employers, employees, and unions.

Abood has engendered exceptionally strong reliance interests on the part of States, public-sector employers, employees, and unions. Reliance is "at the core of" any *stare decisis* analysis, *United States v. Donnelly's Estate*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring), and takes on "added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision," *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Overruling *Abood* would "dislodge settled rights and expectations" for millions of employees, and would "require an extensive legislative response" by 22 States, the District of Columbia, and the Commonwealth of Puerto Rico. *Ibid.*[7]

Following *Abood*, many States passed legislation enabling exclusive representatives to collect agency fees for collective bargaining, contract administration,

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[7] *See* Alaska Stat. § 23.40.110(b); Cal. Gov't Code §§ 3502.5, 3513(k), 3515, 3515.7, 3546, 3583.5; Conn. Gen. Stat. Ann. § 5-280; Del. Code Ann. tit. 19, § 1319; D.C. Code § 1-617.07; Haw. Rev. Stat. § 89-4; 5 Ill. Comp. Stat. 315/6(e), 115 Ill. Comp. Stat. 5/11; Me. Rev. Stat. Ann. tit. 26, § 629; Md. Code Ann., State Pers. & Pens. § 3-502; Mass. Gen. Laws Ann. ch. 150E, § 2; Minn. Stat. Ann. § 179A.06; Mo. Ann. Stat. § 105.520; Mont. Code Ann. § 39-31-204; N.H. Rev. Stat. Ann. §§ 273-A:1, :3; N.J. Stat. Ann. § 34:13A-5.5; N.M. Stat. Ann. § 10-7E-4; N.Y. Civ. Serv. Law § 208(3); Ohio Rev. Code Ann. § 4117.09(C); Or. Rev. Stat. § 243.672(c); 43 Pa. Stat. & Cons. Stat. Ann. § 1102.3; P.R. Laws Ann. tit. 3, § 1451f; 6A R.I. Gen. Laws § 36-11-2; Vt. Stat. Ann. tit. 3, § 962 & tit. 16, § 1982; Wash. Rev. Code Ann. §§ 41.59.100, 41.80.100, 47.64.160.

and grievance adjustment. Several of these States, including Illinois, expressly relied on *Abood* in drafting such legislation. *See* 83d Ill. Gen. Assem., Senate Proceedings, June 27, 1983, at 32 (statements of Sen. Bruce); *see also, e.g.*, N.Y. Div. of Budget, Budget Report for S. 6835, at 3, *reprinted in* Bill Jacket for ch. 677 (1977). Even States that support petitioner in this litigation, *see* Amicus Br. for States of Michigan, et al., relied implicitly on *Abood*'s holding in expressly carving out public-safety unions from their right-to-work legislation, *see* Wis. Stat. § 111.70(2); Mich. Comp. Laws § 423.210(4)(a)(i).

In Illinois, unwinding agency fees would require a substantial legislative response, as these fees are an integral part of the "comprehensive regulatory scheme for public sector bargaining" that has been in place for more than three decades. *See Bd. of Educ. of Cmty. Sch. Dist. No. 1, Coles Cty. v. Compton*, 526 N.E.2d 149, 152 (Ill. 1988) (internal quotation marks omitted). Initially, this system was crafted through "six months of concentrated effort of various segments of labor, public employees, public employers, mayors, attorneys, Chicago, . . . commerce and industry." 83d Ill. Gen. Assem., Senate Proceedings, June 30, 1983, at 97 (statements of Sen. Collins). Such reliance interests weigh in favor of according *stare decisis* effect here. *See Hohn v. United States*, 524 U.S. 236, 261 (1998) (Scalia, J., dissenting) ("While there is scant reason for denying *stare decisis* effect to *House*, there is special reason for according it: the reliance of Congress upon an unrepudiated decision central to the procedural scheme it was creating.").

Unions, state agencies, and courts have all become familiar with the line drawn in *Abood*. Illinois has

adopted specific regulations governing challenges to the agency fee process. *See* 80 Ill. Admin. Code § 1125.10–1125.100; *id.* § 1220.100. And familiarity with the *Abood* rule extends beyond unions and management to private industry as well: the American Arbitration Association, for instance, has adopted a specific set of rules to address the impartial determination of union fees. *See* Am. Arbitration Ass'n, Rules for Impartial Determination of Union Fees (1988).

Overruling *Abood* would affect an untold number of collective bargaining agreements containing agency fee provisions, as well as the interests of the employees, employers, and unions relying on those agreements' terms. As with legislative reliance, "'[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights.'" *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). In fact, so long as there is "a reasonable possibility that parties have structured their business transactions in light of [*Abood*]," there is "reason to let it stand." *Kimble*, 135 S. Ct. at 2410.

B. *Abood*'s standard is workable.

Petitioner cannot show that the standard outlined in *Abood* is "unworkable," *Payne*, 501 U.S. at 827, or that it has "'defied consistent application by the lower courts,'" *Pearson*, 555 U.S. at 235 (quoting *Payne*, 501 U.S. at 829–30). Following *Abood*, the Court has addressed the line between chargeable and nonchargeable expenses in the public sector twice, in *Lehnert*, 500 U.S. at 522, and *Locke v. Karass*, 555 U.S. 207 (2009). *Lehnert* was 8-1 as to several chal-

lenged expenditures and *Locke* was 9-0. Although the Court's division over the scope of chargeable expenses in *Lehnert* confirmed that line-drawing will be difficult in some cases, as *Abood* predicted, 431 U.S. 236–37, that is not nearly enough to label a legal doctrine unworkable.

Petitioner complains that *Lehnert* and *Locke* are "subjective" and "vague," Pet. Br. 26, but on the rare occasions when the Court has invoked vagueness to find a doctrine unworkable in the past, it has pointed to the "experience of the federal courts" and the "inability of later opinions to impart the predictability that the earlier opinion forecast." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). Petitioner does not offer any examples of such unpredictability. Similarly, petitioner's argument that the lower courts have "struggled repeatedly" with classifying union expenditures in the years following *Abood* is unsupported. Pet. Br. 27. Petitioner cites only three cases in conjunction with this argument, one of which is *Knox*. Pet. Br. 27 n.12. But *Knox* addressed an unusual special assessment, did not arise out of a circuit split, and did not reveal a longstanding struggle in the lower courts. In short, this is not a situation where "[a]ttempts by other courts . . . to draw guidance from [*Abood*'s] model have proved it both impracticable and doctrinally barren." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985). And even if courts had difficulty applying the line drawn in *Lehnert*, the solution would be to clarify that line in an appropriate case, not to obliterate it altogether and jettison decades of precedent uphold-

ing agency fees for representational activities. *See supra* I.D.[8]

C. Overruling *Abood* would cast several lines of First Amendment jurisprudence into doubt.

Abood's "close relation to a whole web of precedents means that reversing it could threaten others." *Kimble*, 135 S. Ct. at 2411. Far from being undermined by the subsequent evolution of First Amendment law, *Abood*'s holding has repeatedly been relied on by the Court over the past four decades. Thus, *Keller* cited *Abood* in upholding mandatory fees to support the activities of an integrated bar. 496 U.S. at 13–14; *see also Southworth*, 529 U.S. at 230–31 ("*Abood* and *Keller*. . . provide the beginning point for our analysis."). Likewise, *Glickman* relied on *Abood* to sustain mandatory fees for generic advertising as part of a comprehensive regulatory scheme. 521 U.S. at 472–73; *see also United Foods*, 533 U.S. at 413 (relying on "[a] proper application of the rule in

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[8] Petitioner's argument that the *Abood* standard invites First Amendment abuses, Pet. Br. 27, is both speculative and incorrect. First, Illinois provides petitioner with a simple mechanism to challenge the union's *Hudson* notice, 80 Ill. Admin. Code § 1220.100, but he evidently failed to do so, and his complaint does not allege that this mechanism was inadequate to protect his rights. Second, independent auditors are required to confirm that the expense characterizations in *Hudson* notices are fairly presented and do not contain material misrepresentations. *See* Certified Public Accountants Amicus Br. at 2–3. Finally, to the extent there is concern about the adequacy of the *Hudson* notice procedures, that concern should be addressed in an appropriate case on a fully developed factual record.

Abood"); *Johanns*, 544 U.S. at 558 (*United Foods* "concluded that *Abood* and *Keller* were controlling"). Overruling *Abood* would create needless and undesirable instability in these settled areas of First Amendment jurisprudence.

Petitioner correctly observes that the Court's opinions in *Knox* and *Harris* criticize aspects of *Abood*'s reasoning. Pet. Br. 18–19 (citing *Knox*, 567 U.S. at 310–11, and *Harris*, 134 S. Ct. at 2639). But as noted *supra* I.E, neither of those cases involved agency fees in support of the core employment-related activities of a union representing government employees in a traditional workplace. Indeed, in deciding not to approve a "very substantial expansion of *Abood*'s reach," *Harris* specifically declined to disturb *Abood*'s holding. 134 S. Ct. at 2634, 2638 n.19. The narrow holdings of *Knox* and *Harris* stand in stark contrast to the sweeping relief petitioner now seeks, which would invalidate public-sector agency fees in all their applications.

That contrast illuminates a crucial feature of this case: it is impossible to overrule *Abood* without departing from a principle this Court has acknowledged "[t]ime and again," that "the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear . . . citizens at large," *Nelson*, 562 U.S. at 148 (internal quotation omitted). A decision to overturn *Abood* would thus undermine the foundations of *Pickering*, *Connick*, *Garcetti*, *Borough of Duryea*, and many other settled precedents ranging far beyond the First Amendment. It would also deprive state and local governments of the flexibility our federal system has

conferred on them to manage their workforces in ways that meet local needs.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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